BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Elizabeth Jodoin dated October 10, 1992, alleging discrimination in employment on the basis of sex and family status.

B E T W E E N :

ONTARIO HUMAN RIGHTS COMMISSION

- and -

ELIZABETH JODOIN

Complainant

- and -

CIRO's JEWELLERS (MAYFAIR) INC.
and MORRIS NASH

Respondents

DECISION

Adjudicator : Allan Manson

Date : January 4, 1996

Board File No: BI-0036-95

Decision No : 96-001

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Peggy Smith, Counsel
Elizabeth Jodoin	)	On her own behalf
Morris Nash	)	Cameron Gillies, Agent

IN THE MATTER OF a Board of Inquiry appointed under section 38 of the Ontario ***Human Rights Code***, R.S.O. 1990, c.H-19

AND IN THE MATTER OF a complaint by Elizabeth Jodoin dated October 10, 1992, alleging discrimination in employment on the basis of sex and family status

B E T W E E N:

ELIZABETH JODOIN

Complainant

- and -

CIRO's JEWELLERS (MAYFAIR) INC. and MORRIS NASH

Respondents

Heard: Kingston, October 12, 1995

Board of Inquiry: Allan Manson

Appearances: P. Smith, Counsel for Ontario Human Rights Commission
Elizabeth Jodoin, in person
C. Gillies, Agent for the Respondents

D E C I S I O N

This Board of Inquiry was appointed by the Minister of Citizenship on March 10, 1995 to inquire into the complaint of Elizabeth Jodoin against two respondents originally named as "Ciro's Jewellers and Mr. M. Nash". The complaint was prepared on October 10, 1992.

Procedural Matters:

At the hearing, counsel for the Commission sought to amend the style of cause to reflect the proper legal names of the respondents. In support, she filed the Respondent Questionnaire dated December 16, 1992 and a Corporation Profile Report prepared by the Ministry of Consumer and Commercial Relations. Being satisfied that there was no prejudice to the respondents, the names of the respondents were amended by the Board to read, as above, the proper legal name of the corporate respondent and the proper legal name of the individual respondent who was at all material times the President of the corporate respondent. Hereinafter, I will refer to the corporate respondent as "Ciro's" and the individual respondent as Mr. Nash.

Prior to the hearing, Ciro's filed with the Board a copy of a Certificate of Appointment under s. 49 of the *Bankruptcy and Insolvency Act* indicating that Ciro's had filed an assignment in bankruptcy. On this basis, the respondent submitted that the hearing of the complaint should not proceed and that the complaint should be dismissed. The Board considered a written submission from the respondents dated October 10, 1995 and a submission from Commission counsel dated October 4, 1995. The Board concluded that s.69.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended by S.C. 1992, c.27, s.36(1); S.C. 1994, c.26, s.8 did not stay the proceedings: see *Fitzgibbons v. R. and Law Society of Upper Canada (1990),* 78 C.B.R. 193 (S.C.C.) for an analogous situation. Moreover, the complaint contained allegations against both the corporate and individual respondent. The Board directed that the hearing should proceed. The respondent Nash did not attend the hearing although duly served. The respondents were

represented by Mr. Cameron Gillies who appeared as agent for Mr. Nash and for Richter and Partners, the receiver appointed to supervise the liquidation of Ciro's.

Nature of the Complaint:

This complaint relates to the dismissal of Elizabeth Jodoin from her position as store manager of Ciro's Kingston store. She alleges that her dismissal was in violation of ss. 5(1) and 9 of the Ontario *Human Rights Code* in that the reason for her dismissal was her pregnancy. It should be noted that s. 10(2) of the Ontario *Human Rights Code* provides that the "right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant". From the written submissions tendered by the respondents on the pre-hearing procedural issue, it was clear that the respondents contended that her dismissal was a function of incompetence.

Facts:

Elizabeth Jodoin testified about her employment relationship with Ciro's where she worked from June to September of 1992. She applied for a position as assistant manager of Ciro's Kingston store. After being interviewed by Claire Stea, an employee of Ciro's from the Toronto head office, Mr. Nash hired her as the store manager at $8.00 per hour plus 1 1/2 % commission on personal sales. She testified that there was no mention of any probationary period.

She expected that she would be working about 40 hours per week. Ms. Stea had advised her that there would only be 12 hour shifts around Christmas time.

After being trained by Ms. Stea, she commenced work as the store manager which included motivating sales staff, scheduling the store employees and keeping inventories. She would submit the work schedules to the Toronto office. In preparing the schedules, she tried to keep shifts to a maximum of eight hours. According to her testimony, the schedules would be FAXED back with revisions which substituted longer shifts, 12 hours in duration, two or three times per week, for the store manager, assistant manager and full-time employees. She testified that she was not unhappy about the longer hours. Ms. Jodoin admitted that she made some mistakes in the early period. She recalled forgetting to lock the diamond case on two occasions. An employee pointed this out and she corrected the situation.

Another former employee of Ciro's, David Slack, gave evidence. Mr. Slack worked at Ciro's during the relevant period. He has 10 years experience in the retail jewellery business. He confirmed that "9 out of 10" of the schedules prepared by Ms. Jodoin were returned with revisions including 12 hour shifts. He did not see any problems with the schedules which Ms. Jodoin had prepared. He found her to be an acceptable day-to-day manager. He also recalled that there were a "couple of times" when Ms. Jodoin forgot to lock the diamond case but said that "everyone" at one time or another would make this mistake. He described Mr. Nash as a difficult employer who did not encourage staff and would often humiliate staff in front of customers.

Around July 17 1992, she discovered that she was pregnant. She was the mother of a young daughter and had experienced a miscarriage earlier that year. Her physician advised her that she needed to rest after several hours work and that she needed to sit down often while on the job. She did not immediately tell Mr. Nash explaining that she did not feel that he would approve of a pregnant Store Manager. She acknowledged that she had no basis in fact for this opinion but based it only on her assessment of his personality. Without telling anyone that she was pregnant, she requested shorter shifts. Later, on August 14, 1992, she reviewed the revised schedule for the upcoming week and realized that 12 hour shifts were still required. At this point other employees, including Mr. Slack, knew that she was pregnant. She FAXED a message to Mr. Nash (Exhibit 4):

> In reviewing the re-vised (sic) schedule of Aug. 17-22/92, I am unable to work 12 hour shifts effective immediately. I am pregnant and for health reasons unable to be on my feet for 12 hours a day. If you are unhappy with this then feel free to terminate my employment if you are unable to come to some sort of compromise. I wish to have a reply sometime today.
>
> Liz Jodoin

In response, a new schedule was FAXED from Toronto removing all the 12 hour shifts for Ms. Jodoin. There was no other discussion or correspondence at the time with Ms. Jodoin but Mr. Nash confronted Mr. Slack and asked him how long he had known of Ms. Jodoin's pregnancy.

A few days later, on August 17, 1992, her husband showed her an advertisement which appeared in the Kingston Whig Standard of that date. The ad had been placed by Ciro's and was seeking "Manager, Sales Help". Applicants were advised to attend the next day at the store for interviews. The next day, Ms. Jodoin went to work as usual but an employee advised that she had been instructed by Mr. Nash not to permit Ms. Jodoin behind the counter.

Later, she met with Mr. Nash who came to the store to conduct interviews. She showed him a letter from her physician which said that she could not work more than eight hours per shift and preferably that she be permitted "some time in a sitting position". The meeting on August 18, 1992 lasted for 20 minutes. Although Ms. Jodoin believed that she could handle the managerial job and that it could be performed with only eight hour shifts, Mr. Nash was adamant that the manger had to work 12 hour shifts. He indicated that he no longer wanted her to be store manager. She told him that he could not fire her because she was pregnant. Mr Nash then offered to let her stay on as a "sales associate" working a 40 hour week without any 12 hour shifts at the same rate of pay. Ms. Jodoin testified that she accepted the demotion because she believed she had no choice. She did, however, think it was unusual to be offered the same rate of pay.

The next day she returned to work. One of the full-time employees, Barbara Hartwick, had earlier requested a vacation and was to be off for two weeks. Ms. Jodoin continued to work at Ciro's. When Ms. Hartwick's vacation period was coming to an end, the work schedule for the next week had a new name on it, Fay O'Neill. Ms. Jodoin was advised that she was a new salesperson. On August 31, 1992, at 10:00 a.m., Mr. Nash telephoned Ms. Jodoin and told her that her services were no longer required and that she should not come into work. According to Ms. Jodoin's testimony, she replied: "You can't do this." Mr. Nash answered: "I can do whatever I want."

Three days later, Ms. Jodoin began a search for a new job. Over the next four months, she applied for eleven jobs but was not hired. Her only employment was as Christmas help at the Liquor Control Board of Ontario store. On February 19, 1993, she gave birth to a daughter.

Mr. Gillies, although he was appearing as agent, wanted to give evidence for the respondents. Ordinarily, this would not be permitted. Mr. Gillies is the Vice-President of Silverman Jewellers Consultants Canada Inc. who were appointed by the receiver, Richter and Partners, to supervise the liquidation of Ciro's. Because he was not a lawyer, and also because his position with the receiver would place him in custody of business records and documents, the Board ruled that in these unusual circumstances he could give testimony. With 15 years experience in the jewellery business, he testified about the importance of keeping cases locked and the amount of theft attributable to such careless practices. He also described the current financial situation of Ciro's and commented on the amount of sales which a store like the Kingston operation would generate. When shown the sales summaries for the period when Ms. Jodoin was the manager, he agreed that they were "within the appropriate range".

Mr. Gillies testified that upon taking over recently the head office of Ciro's he found a "Procedural Manual" which stated that all employment would include a three month probationary period. There was, however, no evidence that a probationary period was part of Ms. Jodoin's contract of employment.

Mr. Gillies had three letters which he had received from Mr. Nash and which he wanted to introduce into evidence. One came from another employee at the Ciro's Kingston store and, apparently, contained some critical comment or comments about Ms. Jodoin. The other two letters were from current employees at other Ciro's stores who, apparently, explained their treatment by Ciro's when they were pregnant. These were not admitted into evidence for the reasons explained below. No other evidence was called on behalf of the respondents.

Admissibility of the Letters:

The three letters tendered by Mr. Gillies were hearsay. That is, they constituted out-of-court written statements offered to prove the truth of their contents. Certainly, the Board can admit hearsay evidence although it would be, subject to exceptions, excluded from court processes: see s.15(1) of the *Statutory Powers Procedure Act* R.S.O. 1990, c. 22, The dangers of admitting hearsay arise from (1) the fact that the statement is not under oath or affirmation; and (2) without an opportunity to cross-examine, there may be issues of perception, memory, ambiguous communication or sincerity which affect the reliability of the statement. While a Board can admit hearsay evidence it ought to consider whether any of the factors which bear on reliability are present. The Board should consider the relationship between the hearsay evidence and the case which it is offered to support. Where the hearsay evidence goes to a central issue without any direct testimony to support it, a Board should be reluctant to admit it: see *Parks v. Christian Horizons* (1991), 16 C.H.R.R. D/40, (Ont. Bd. of Inquiry) at D/51.

Issues:

The complaint will be made out if a breach of the *Code* was the reason, or even one of the reasons, for Ms. Jodoin's dismissal. As a result of the manner in which the respondents have treated this case, the issues are straight forward. First, is there any reason not to accept the evidence of Ms. Jodoin? She gave her testimony in a clear and communicative manner. It was confirmed by documents and, in some part, by the testimony of Mr. Slack. It was not contradicted. I conclude that her testimony as to the material events should be accepted.

Secondly, does her evidence establish the reason for her dismissal? As quoted above, Exhibit 4 was the first notice to Mr. Nash that she was pregnant. It came after an unsuccessful attempt by Ms. Jodoin to have the 12 hour shifts removed from her schedule. It contains the sentence: "If you are unhappy with this then feel free to terminate my employment if you are unable to come to some sort of compromise." While there is a degree of ambiguity to this statement, Ms. Jodoin testified that she did not want to leave her employment and used this sentence only because she was attempting to convey her urgent need for a response. In her mind, this was a request for accommodation, albeit badly worded. The subsequent actions of Mr. Nash indicate that he did not choose to make any accommodation.

Mr. Nash did not respond to the FAX but sent a revised work schedule for the August 17 to 22 period in which had removed the 12 hour shifts for Ms. Jodoin. On August 17, 1992 the ad for the manager's job appeared in the Whig Standard. On August 18, 1992, Mr. Nash met with

Here, one letter was offered to show something about Ms. Jodoin's competence. While the respondents had alerted the Board that their defence was that the reason for her dismissal was incompetence, no evidence was adduced before the Board to support this defence. In particular, their was no evidence from the respondents to explain why she was dismissed. Mr. Nash chose not to attend the hearing and his reasons for Ms. Jodoin's dismissal were not adduced before the Board. Even if the co-worker's letter disclosed an allegation of incompetence, there was no evidence to show that Mr. Nash acted on it. Moreover, nothing was said to the Board which suggested any circumstantial guarantees of trustworthiness in a situation where the usual risks presented by hearsay, as listed above, seemed to be apparent. Accordingly, this letter was not admitted.

The letters from other employees about their treatment while pregnant represented evidence which would be admissible if given viva voce. In hearsay form, it was impossible to know what generated the letters and, in relevant detail, what proposition they communicated. It was impossible to know whether the situations of the employees were comparable to Ms. Jodoin. For these reasons, without an opportunity to cross-examine, the Board concluded that these letters also should not be admitted. In the circumstances of the case, their probative value would have been minimal in any event.

Ms. Jodoin and they agreed that she would stay on as a sales associate. While this was a demotion, it would carry the same compensation. As of August 18, 1992, Ms. Jodoin was an employee of Ciro's although in a different capacity. She continued to work at the Ciro's store until Ms. Hartwick returned from her vacation when she was summarily dismissed by a telephone call from Mr. Nash. It appears that the demotion was a sham. It was part of a plan to terminate Ms. Jodoin after the vacationing employee returned. The Board is satisfied that Mr. Nash dismissed Ms. Jodoin, at least in part, because she was pregnant and could not work 12 hour shifts. The Board is also satisfied that no efforts were made to accommodate Ms. Jodoin although, on the evidence, accommodation could have been achieved with little effort.

Conclusion on the Merits:

Did the dismissal constitute a denial of equal treatment and discrimination under s. 5 of the *Code*? As noted above, s. 10(2) of the *Code* provides that the "right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant." On the basis of the findings above, Ms. Jodoin was denied the right to equal treatment without discrimination because of sex. There was no evidence of any "reasonable and bona fide qualification" under s. 24(1)(b). Moreover, the uncontradicted evidence indicates that Ms. Jodoin could have been accommodated without much difficulty.

Section 9 of the Ontario *Human Rights Code* provides:

> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this part.

The Board is satisfied that the actions of Mr. Nash in dismissing Ms. Jodoin, for which the corporate respondent Ciro's is in law responsible, constituted an infringement of her right to equal treatment without discrimination because of sex under s.5 of the *Code* for which Ms. Jodoin is entitled to a remedy under s.41.

Damages:

Ms. Jodoin claims an award under s. 41(1)(b) of the *Code* and claims damages for the following:

1. Lost wages between August 31, 1992 and February 17, 1993;
2. Commission she had earned in the amount of $267.24 but was not paid after her employment was terminated;
3. Commission on projected sales for the period September, 1992 to February, 1993;
4. Maternity benefits from the Unemployment Insurance Commission which she did not receive because she had insufficient eligibility;
5. General damages for the "intrinsic loss" including the humiliation and the recognition of the importance of pregnancy to a woman's life; and
6. Interest in accordance with s. 127 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended.

(1) Lost Wages:

The loss of income arose directly out of the infringement in this case. The purpose of compensation for loss of income is to restore the complainant to where she would have been if the discrimination had not occurred. The measure of damages is not based on the concept of notice as would apply to wrongful dismissal: see *Piazza v. Airport Taxi Cab (Malton) Assoc.* (1989), 10 C.H.R.R. D/6347 (Ont.C.A.) per Zuber, J.A. at D/6348; *Whitehead v. Servodyne Canada Ltd.*(1987), 8 C.H.R.R. D/3874 (Ont.Bd. of Inquiry) at D/3877-3878. Yet, the Board should not extend damages indefinitely but should find a reasonably foreseeable length of time for which the complainant should be compensated: see *Ontario Human Rights Commission v. Gaines Pet Foods Corp.* (1993), 16 O.R. (3d) 290 (Ont. Div. Ct.) The Board is satisfied that Ms. Jodoin made serious efforts to mitigate her loss by seeking other employment but, with the exception of some temporary Christmas work from December 12, 1992 to December 31, 1992, she remained unemployed until her daughter was born in February, 1993. Accordingly, in the Board's view, she is entitled to compensation for eighteen weeks work which is the period from September to February minus the two weeks in December. Some pay cheque stubs were entered into evidence. The only deductions were for U.I.C., C.P.P. and income tax. It was Ms. Jodoin's evidence that she only wanted to work 40 hours per week. Accordingly, she is entitled to $320.00 x 18 weeks which is $5760.00 for lost wages.

(2) Commission already earned:

Apparently, the employer claimed that commission could only be paid to current employees. As a result, $267.24 of earned commission was not paid to Ms. Jodoin. The notation at the bottom of the application for employment read "Need to be employed to receive." Ms. Jodoin explained that, in her view, this meant that no commissions would be paid on "layaway" merchandise if the seller was not employed at the time when payment was finally made. It did not mean, in her view, that commissions already earned and payable would not be paid if the employee was terminated. The Board accepts Ms. Jodoin interpretation. Otherwise, an employer could simply delay paying commissions already earned and then use termination as an excuse for non-payment. This makes no sense. However, does the non-payment of these commissions already earned represent "loss arising out of the infringement"? Ordinarily, one might say that this loss arises out of a controversy over the interpretation of the contract of employment not an infringement of the *Code*. Here, the employer's interpretation permitted it to rely on the termination as a basis for non-payment. The termination has been ruled to be in violation of the *Code*. The Board's jurisdiction to award damages for losses is restricted to losses "arising out of the infringement". The Board concludes that the failure to pay commissions already owing because of the termination constituted a loss which flows from the infringement when that termination is in violation of the *Code*.

(c) Future commissions:

Counsel argued that the termination of Ms. Jodoin's employment resulted in the loss of her ability to earn the 1 1/2 % commission on her personal sales. As indicated above, it is the central purpose of an award under s. 41(1) to restore the complainant as much as is reasonably possible to the position she would have been without the violation of the *Code*: see *Airport Taxi*, supra. This is not the kind of "lost opportunity" questioned by Carruthers, J. in *York Condominium Corp. No. 216 v. Dudnik* (1991), 14 C.H.R.R. D/406 (Ont. Div. Ct.) at D/412. Here, what was lost was future income. A retail sales person may work for wages plus commission or for straight commission. Surely, in the latter case, the proper remedy for a termination in violation of the *Code* would be compensation for lost commissions. Similarly, when a person is paid by wages plus commission, the appropriate compensatory remedy should provide for both kinds of lost income. The lost opportunity to earn commission is an economic loss which flowed directly from the *Code* infringement and she is entitled to compensation. The method of calculation is another manner.

When the issue is future lost wages for a complainant who worked variable hours, Boards of Inquiry have used average past data to estimate future loss: see *Jenner v. Pointe Weste Development Corp.*(1993), 21 C.H.R.R. D/336 (Ont. Bd. Of Inquiry). Surely the same technique should apply to commissions. In evidence, there are the sales data for June, July and August of 1992. During the eleven weeks of that period when Ms. Jodoin was employed at Ciro's, her sales totalled $17,371.78 (June=$2,640.70; July =$7,283.95; August=$7,447.13). This represents an average of $1,579.25 per week. Although the termination meant that Ms. Jodoin was not earning

commission over the Christmas period, probably the most productive time of the retail year, the Board has no evidence to show how, in fact, sales are affected. The only available mechanism is to estimate future commissions by reference to past sales. Accordingly, during the 18 week period over which Ms. Jodoin is entitled to compensation, one can estimate her sales at $28,426.50 (18 x 1579.25). On this amount, her commission at 1 1/2 % would be $426.39.

(4) Maternity Benefits:

Ms. Jodoin had insufficient eligibility to qualify for maternity benefits which would have provided her with 15 weeks paid benefits calculated at 60% of her average earnings. She testified that she was one week short. Clearly, had she not been terminated, she would have qualified for maternity benefits. Are the loss of maternity benefits an item for which she can claim compensation under s.41(1)(b)?

In *Grieves v. Admiral Sub and Chatzis*, an unreported decision of an Ontario Board of Inquiry (B. Hovius) released June 13, 1994, the Board considered this remedial issue in the context of a woman who was dismissed because she was pregnant. The Board examined relevant authorities and concluded:

> In this case, I have concluded that Ms. Grieves would have worked at Admiral Sub on a full-time basis until the end of August, 1992. This would have made her eligible for fifteen weeks of maternity benefits totalling $2800.00 under the Unemployment Insurance scheme. Because she was fired, she was ineligible and received no benefits.
>
> I am aware that the Federal Court of Appeal in Canada v. McAlpine, [1989] 3 F.C. 530 set aside an award of compensation under the *Canadian Human Rights Act* for lost unemployment

> insurance benefits when the respondent refused to hire a pregnant woman for a fourteen week job. The main basis for the decision was the wording of the remedial power granted to the tribunal by the statute. Since the wording of s. 41(1) of the *Code* is considerably broader, the case can be distinguished on that basis. However, the Federal Court of Appeal also indicated (at 538) that the tribunal had erred in not applying the principle that "[only such of the actual loss resulting as is reasonably foreseeable is recoverable". The court suggested that the loss of regular Unemployment Insurance benefits was not reasonably foreseeable in the circumstances of that case. Here, however, as I have indicated, it was reasonably foreseeable that Ms. Grieves would not obtain full-time employment during her pregnancy and, therefore, fail to qualify for maternity leave benefits.

In *Grieves*, the Board allowed the claim for loss of maternity benefits but no other claims for economic loss beyond that point on the basis that "monetary damages for lost wages should be cut off at the point where those damages can no longer be considered reasonably foreseeable at the time of the wrongdoer's act".

Relying on *Grieves* and the reasonable foreseeability test, the Board concludes that Ms. Jodoin's inability to qualify for maternity benefits due to insufficient full-time work credits should be attributed to the respondents. The issue of maternity leave for a pregnant employee should be reasonably foreseeable to an experienced contemporary employer. Using the average weekly wage of $320.00, the maternity benefits would be: 60% x $320 x 15 weeks= $2880.00.

Counsel advised the Board that Ms. Jodoin received other Unemployment Insurance benefits in the amount of $1,320. Counsel submitted that this amount should be deducted from this item of compensatory damages. Clearly, this amount was paid after the complainant's departure from Ciro's but no details were provided as to its relationship with maternity benefits. In *Grieves*, supra, the Board treated this matter differently. It concluded that the benefits related to the period for which lost wages were awarded. Accordingly, it did not deduct the amount

already received from the award but acknowledged that the employer should remit that amount directly to the Receiver General. Here, the Board is left without an evidentiary explanation about the nature and timing of the benefits received. Accordingly, since Counsel's submission does not prejudice the respondents, the Board will accept it and will deduct the amount of benefits received leaving an award for this element in the amount of $1, 560.00.

(5) General Damages:

Counsel argued that Ms. Jodoin was entitled to an award of general damages based on the humiliation and loss of dignity arising out of the discrimination. She asked that $5,000.00 be awarded under this head. The availability of damages for the "intrinsic value" of the contravened human right has been confirmed on a number of occasions by Ontario Boards of Inquiry : see *Lampman v. Photoflair Ltd.*(1992), 18 C.H.R.R. D/196 at D/210-212; *Leshner v Ontario (No.2)*(1992), 16 C.H.R.R. D/184 (Ont. Bd. of Inquiry) at D/210; *Hajla v. Nestoras* (1987), 8 C.H.R.R. D/3879 (Ont. Bd. of Inquiry) at D/3883. The award, however, must be commensurate with the injury. This kind of award is distinct from a claim for "mental anguish".

Ms. Jodoin testified that she was humiliated by the demotion. The Board has already concluded that the demotion was part of the planned termination of Ms. Jodoin. This sense of humiliation is a relevant factor in assessing the loss to Ms. Jodoin's self respect, dignity, and the right to be free of discrimination. It is also relevant to consider the significance of pregnancy to a woman's sense of self. Ms. Jodoin fits into a category which might be described as "particularly

vulnerable" given that she had a miscarriage shortly before the series of events which gave rise to this complaint.

In *Grieves*, supra, counsel submitted that an award of $2,500.00 was appropriate but the Board found that this was "rather high in the circumstances" and $500.00 was awarded. That case did not involve any element of humiliation before co-workers. Moreover, the personal history of the complainant was different and the employer had not embarked on a disingenuous course of conduct. In *Lord v. Haldimand-Norfolk Police Services Board*, unreported decision of Ontario Board of Inquiry (L. Mikus) released June 14, 1995, the Board found a violation of the right to equal treatment in employment without discrimination because of sex. The complainant was pregnant and was offered an alternative position which would have required her to resign her position on the force leading to various negative consequences. The Board considered that offer to be both an inadequate and unreasonable response to the complainant's request for accommodation. Evidence was adduced from the complainant and her physician indicating that she suffered physical and emotional consequences as a result of her employer's refusal to provide her with alternative work. Along with the conclusion that the respondents' "actions were callous and intentional", the Board was persuaded that a "significant" award was justified. The sum of $10,000.00 was awarded.

The award of general damages for the loss of the "intrinsic value" of human rights protections should not be confused with a claim based on mental anguish pursuant to s. 41(1)(b). The issue involves a consideration of the violative conduct and its consequences. The Board must consider the gravity of the violation, its perceptible impact on others, and the vulnerability of the complainant. Here, the Board has concluded that the respondents acted deliberately and

disingenuously. Co-workers would have been aware of the process by which Ms. Jodoin was terminated and the fact that her request for accommodation was the genesis of that process. The complainant suffered humiliation in front of her co-workers as a result of her demotion prior to the termination. As a result, I am of the view that Ms. Jodoin is entitled to $5,000.00 for general damages.

(6) Interest:

The complainant is entitled to interest on the award: see *Lampman v. Photoflair*, supra; *Henwood v. Gerry Van Wart Sales Inc.*, unreported decision of Ontario Board of Inquiry (R. Anand) released February 21, 1995. With respect to general damages, interest should be calculated by applying the appropriate rate as provided by s. 127 of the *Courts of Justice Act* from the date of the complaint. The applicable rate is 9% per annum being the rate designated for the last quarter before the date of this order. In this case, however, the award has a number of elements which must be treated differently. The award for commissions already payable in the amount of $267.24 and the general damage award can be said to have crystallized with the violation. The relevant interest date is therefore the date of the complaint. The other elements of the award accrued over time. The other elements accrued over the subsequent periods: eighteen weeks during the period September, 1992 to February, 1993 (lost income and lost commissions); and the fifteen weeks after the birth of the complainant's daughter(lost maternity benefits). It has been observed that interest on damages for lost wages should not be calculated in advance of their accrual: see *Whitehead v. Servodyne Canada Ltd.*, supra, at D/3879. Similar reasoning would

apply to the other elements of the award. The actual losses for which compensation is ordered accrued incrementally over time. For example, after each lost pay period, an amount of lost wages accrued. Without resorting to a complicated calculus, in a case where there are various elements accruing over a continuous period, it may be appropriate to choose a median point for the purpose of interest calculation. This takes into account the fact that some of the award accrued before the median point and some accrued after. Here, the choice of a median may be appropriate and practicable. This approach may seem novel and may not fit every situation but it lends itself to the chronological facts of this case. February 1, 1993 is an appropriate median date. It balances the period of lost wages and commission which occurred before that date with the end of the 15 week maternity benefits claim which commenced on February 19, 1993. In temporal terms, there will be periods of approximately 18 weeks both before and after the median point of February 1, 1993. Using February 1, 1993 as the interest calculation date also represents the date upon which, retrospectively, all elements of the award are discernible. Therefore, the Board concludes that October 10, 1992, is the relevant interest date for the general damage and commissions already payable while February 1, 1993, is applicable to all other claims.

The calculation of interest is as follows:

(I) General Damages plus commissions already payable:

$$(5{,}000 + 267.24) \times \frac{37 \text{ months}}{12} \times 9\% = \$1461.67$$

(ii) Other elements of the award:

Lost wages	5760.00
Lost commissions	426.39
Lost maternity benefits	1560.00
	7746.39

$$7746.39 \times \frac{32 \text{ months}}{12} \times 9\% = \$1,859.13$$

The total interest amount is $3,320.80

Award:

In accordance with the analysis above, the complainant is entitled to the following compensation pursuant to s. 41(1)(b):

General damages-	$5,000.00
Commission directly payable	267.24
Lost wages-	5,760.00
Lost future commissions-	426.39
Lost maternity benefits-	1,560.00
Interest-	3,320.80
Total	16,334.43

The respondents are jointly and severally liable for this amount in compensation for the violation of Ms. Jodoin's rights under the Ontario *Human Rights Code*.

Therefore the respondents are ordered to pay to the complainant the total sum of $16,334.43

DATED at Kingston this 4th day of January, 1996.

Allan Manson
Board of Inquiry